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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 401

UNITED STATES OF AMERICA,

Petitioner,

—v.—

WOODCREST CONSTRUCTION COMPANY, INC. and THE HOME INDEMNITY COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Basic Fact Is Undisputed: the Government in Its Invitation to Bid, Distributed to Respondent and All Other Bidders Boring Information Which Was False

The Government admitted that the boring information, which it distributed to respondent and all other bidders on this project, did not disclose the presence of sub-surface water (although the Government's borings did find such water), and, on the contrary, represented that there was no sub-surface water encountered at the site.

The Government admits this misrepresentation, but, it argues, respondent should not have been misled by the false information given to it, because respondent should

have ignored this false information and relied on its own knowledge as to what the conditions were at the site, not based on direct information as to what was exactly on the site, but rather that respondent should have presumed, from work it had performed in other areas in Florida, that the information was false. On this argument, the Board of Contract Appeals held that the contractor should have ignored the direct misrepresentations made by the Government and substituted its own guesswork. This unwarranted finding, in and of itself, justified the Court of Claims in setting aside the findings of the Board of Contract Appeals.

Whether the inspection made by Woodcrest was a hasty or a slow inspection, actually plays no part in the determination of this case. What the Government is arguing is that Woodcrest substitute its guesswork (for it never did work at the base itself) as to what the sub-surface conditions might be, against the Government's direct representations as to what the Government purportedly found, by borings actually taken at the site by the Government.

The purpose of a site inspection is, basically, not to go below the ground where direct representations have been made as to what the sub-surface conditions are, but rather to see the conditions as they exist at the site for the purpose of determining methods of access, egress, storage of materials, placement of equipment, etc. The only time a contractor could possibly be charged with knowledge superior to the Government's as contained in the direct representations of the boring sheets, would be if the contractor was actually working at the exact location where the borings were taken and, therefore, had direct knowledge that what the Government represented was false.

Bearing in mind that the Government advertises for competitive bids, and awards its contracts to the lowest responsible bidder, and issues boring information so as to avoid the possibility of the contractors adding a substantial amount of money to their bids because they are not familiar with the sub-surface conditions, a contractor is certainly never justified in substituting its own guesswork against a direct representation made by the Government.

It is respectfully submitted that the Court of Claims in no way misinterpreted or misapplied *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474.

Mr. Justice Frankfurter's opinion, and particularly the footnotes which he cites in connection therewith, are most significant. The Government's position taken here, that the Court of Claims should have ignored completely respondent's arguments and proof and consider only the Government's argument, was held untenable by Mr. Justice Frankfurter, when he stated at 481 and 482:

> "They reported that under a 'prevalent' interpretation of the 'substantial evidence' rule 'if what is called "substantial evidence" is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored.' Their view led them to recommend that Congress enact principles of review applicable to all agencies not excepted by unique characteristics. One

of these principles was expressed by the formula that judicial review could extend to 'findings, inferences, or conclusions of fact unsupported upon the whole record, by substantial evidence.' So far as the *history of this movement for enlarged review reveals, the phrase 'upon the whole record' makes its first appearance in this recommendation of the minority of the Attorney General's Committee. This evidence of the close relationship between the phrase and the criticism out of which it arose is important, for the substance of this formula for judicial review found its way into the statute books when Congress with unquestioning—we might even say uncritical—unanimity enacted the Administrative Procedure Act."

After holding that the same standard of review and proof was applicable to review of the Labor Board determinations under the Taft-Hartley Act, to determinations of other Boards under the Administrative Procedure Act, Mr. Justice Frankfurter stated at 487 and 488:

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation *definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record."

And again at 488:

"Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

And again at 490:

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The cases of *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, and *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, in no way change this situation.

The Court of Claims is absolutely consistent here with its decision in *United Contractors* v. *United States*, 177 Court of Claims 151, 368 Fed. 2d 585, where it stated:

> 167: "Nor can we accept the Board's alternative conclusion that plaintiff must have anticipated water because it had 'previous construction experience in the area', and, 'if water was found in the quantity which appellant [plaintiff] alleges, it must have been present in prior, recent construction.' • • • "
>
> 168: "We hold, therefore, that plaintiff did not expect or have reasonable cause to anticipate, from information either within or without the confines of its agreement, that it would encounter underground conditions like those experienced. 'The very purpose of Article 4 is to prevent bidders from adding high contingency factors to protect themselves against unusual conditions discovered while excavating, for obviously no one can ever know with certainty what will be found during subsurface operations. The article is thus expressly designed to take at least some of the gamble out of subsurface operations.' Kaiser Industries Corp. v. United States, supra, 169 Ct. Cl. at 323, 340 F. 2d at 329. Its object is to persuade contractors to calculate bids on the basis of the description contained in the specifications, plans, and drawings (including the borings). That rationale is served by allowing United to recover an equitable adjustment because it had to deal with unanticipated amounts of subsurface water."

To the same effect, the Court of Claims held in *Morrison-Knudsen Company, Inc.* v. *The United States,* 170 Court of Claims 712:

"The plaintiff, in submitting its bid and in entering into the contract, had a right to rely upon the positive representations that were made by the defendant regarding the sub-surface conditions that purportedly had been encountered in drilling holes 260 and 261. Levering & Garrigues Co. v. United States, 73 Ct. Cl. 566, 574 (1932). Such positive representations amounted to a warranty (Atlantic Dredging Co. v. United States, 53 Ct. Cl. 490, 502 (1918), aff'd 253 U.S. 1), and established a predicate for a possible action for breach of contract when it was later discovered by the plaintiff that the defendant's representations concerning sub-surface conditions at the two points were untrue (Frank P. Ragonese et al. v. United States, 128 Ct. Cl. 156, 163 (1954), 120 F. Supp. 768). It was not incumbent upon the plaintiff, prior to submitting its bid and entering into the contract, to conduct its own investigation in order to ascertain the truth or falsity of the defendant's positive assertions regarding subsurface conditions encountered in drilling holes 260 and 261, even though the contract contained a general condition stating that 'The Contractor further acknowledges that he has satisfied himself as to the character, quality and quantity of surface and sub-surface materials to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government,' and also contained a technical provision stating that 'the Gov-

ernment does not guarantee that materials other than those disclosed by the explorations [i.e., the test borings] will not be encountered.' Hollerbach v. United States, 233 U.S. 165, 172 (1914); Flippin Materials Co. v. United States, 160 Ct. Cl. 357, 365 (1963), 312 F. 2d 408. A significant factor in this connection was the circumstance that the physical conditions dealt with in the defendant's untrue representations were hidden in the subsurface, and the plaintiff could not determine the truth or falsity of the representations by mere observation. Atlantic Dredging Co. v. United States, supra, at p. 502."

To the same effect:

Flippin Materials Company, et al. v. *United States,* 160 Court of Claims 357;

Farnsworth & Chambers Co., Inc. v. *The United States,* 170 Court of Claims 30.

The rule as laid down and applied by the Court of Claims in the instant case is in no way inconsistent or contrary to the rules which it has applied in numerous previous cases above cited, and the decision is in direct compliance with the standards as enunciated by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, *supra* and does not justify any further review by this Court.

The exact situation that has occurred in the instant case was contemplated by this Court in the case of *United States* v. *Carlo Bianchi & Co.,* 373 U.S. 709, *supra* and quoted by Mr. Justice White in the case of *United States* v. *Anthony*

Grace & Sons, 384 U.S. 424, *supra* wherein Mr. Justice White stated:

> "This question was anticipated in Bianchi, supra, where we considered what a reviewing court should do when the administrative record is defective, or inadequate or reveals the commission of a prejudicial error. Two suggestions were given:
>
> > 'First, there would undoubtedly be situations in which the court would be warranted, on the basis of the administrative record, in granting judgment for the contractor without the need for further administrative action. Second, in situations where the court believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court could not stay its own proceedings pending some further action before the agency involved. Cf. Pennsylvania R. Co. v. United States, 363 U.S. 202."

In the present case, the Court of Claims has followed exactly the standards as set forth by this Court.

The Present Case Presents No Issue for Review by This Court Pursuant to Rule 19 of the Supreme Court Rules

As pointed out above, the Court of Claims, in its determination of the present case, is absolutely consistent with its prior determinations in comparable cases. There is no conflict or inconsistency with prior rulings.

In effect, what the Government is asking this Court to do is review the Findings of Fact as made by the Court of Claims, with which the Government is dissatisfied. This Court has consistently taken the position that it will not review the Findings of Fact.

In the case of *United States* v. *Wells,* 283 U.S. 102, this Court stated at page 120:

> "The findings of fact of the Court of Claims are to be treated like the verdict of a jury. We cannot add to them, or modify them, but the absence of the finding of an ultimate fact does not require a reversal of the judgment if the circumstantial facts as found are such that the ultimate fact follows from them as a necessary inference."

To the same effect, see *U. S.* v. *Esnault-Pelterie,* 303 U.S. 26.

As stated by this Court in *Chesapeake & Potomac Telephone Co.* v. *United States,* 281 U.S. 385, at 388:

> "It seems to us that the dissent of two of the Judges of the Court below is directed rather to the findings than to the statement of the law upon the findings as they stand. These are not open to question before us."

Pursuant to the policy and rules of law established by this Court, that it will not review Findings of Fact by the Court of Claims, the Government's argument for certiorari is without basis or foundation.

The Wunderlich Act imposes on the Court of Claims the duty to examine into the factual situation. Mr. Justice Frankfurter made this abundantly clear in *Universal*

Camera Corp. v. *National Labor Relations Board,* 340 U.S. 474, *supra* and the same is true under the Administrative Procedure Act.

Merely because the Government disagrees with the Findings of Fact as established by the Court of Claims, is no basis for a review by this Court.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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